YAP LAI YOKE

v.

CHIN FOOK WAH & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NOS. 223 & 228 OF 1983]
11 JUNE 1984

TORT: *Trespass - Encroachment upon plaintiff's land - Whether resurvey should be ordered - Existing survey - Whether within meaning of s. 396, National Land Code - Whether final and conclusive - Qualified title - Effect.*

The plaintiff (respondent) was the registered proprietor of land held under qualified title, while the defendants (appellants) were owners of adjoining lots, also under qualified titles. A survey of the area had been carried out by the Chief Surveyor. The defendants built extensions to their buildings, thereby encroaching on the plaintiff's land. The encroachment occurred as a result of the wrongful siting of the public road. The trial Judge found for the plaintiff. The defendants appealed.

Held:

[1] There was encroachment by the defendants upon the lands of the plaintiff. The plaintiff had clearly established on the balance of probabilities that the lands upon which the defendants had built were his.

[2] The survey that had been carried out was within s. 396 of the National Land Code. It could be accepted as a "final" survey.

[3] A resurvey could not be ordered. Section 83(3) was not applicable and the Court would not exercise its power under s. 417 and order a resurvey. The plaintiff could not be deprived of the use and occupation of his land. It was not right or equitable that the malfeasance of the authorities concerned in mis-siting the road which deprived the defendants of their rightful land areas should be visited upon the plaintiff, who was innocent. The effect of the survey was that the boundaries shown by the survey were conclusive. Under s. 176 (2) of the National Land Code, a qualified title should confer on the proprietor the "like rights", that is to say the protection under s. 340. Section 92 states clearly that alienation of State land is indefeasible. An adverse possession is no defence under s. 341. The question of encroachment in the case was based on the relative strength of the titles of the parties. All had qualified titles, which were therefore of equal strength. (*Ocean Estates Ltd. v. Norman Pinder* [1969] 2 AC 19).

[4] The amount of damages awarded by the trial Judge were not unreasonable or unfair.

[Appeal dismissed.]

Case referred to:
Ocean Estates Ltd. v. Norman Pinder [1969] 2 AC 19

Legislation referred to:
National Land Code Act 56/1965, ss. 83(3), 92, 176(2), 341, 396, 417

For the appellant in C.A. No. 223/83 - R. Khoo; (Y.N. Foo with him); M/s. Shearn Delamore & Co.
For the appellant in C.A. No. 228/83 - S.Y. Chow; M/s. Chye, Chow, Chung & Co.
For the respondent - V.P. Pradhan; M/s. Skrine & Co.

JUDGMENT

Lee Hun Hoe CJ Borneo:

The plaintiff Chin Fook Wah is the administrator of the estate of Chin Lan (deceased) the owner of Lot 1735 in the Mukim of Ulu Kelang in the State of Selangor. He is now the registered proprietor of the land under qualified title under H.S. (M) 343. The two defendants are owners of adjoining lots. Yap Lai Yoke is the owner of Lot 1738 and Yong Ah Noi @ Yong Sau Fong the owner of Lot 1739. In the course of their occupation both unlawfully built extensions to their buildings thereby encroaching on plaintiff's land. In the case of Yap Lai Yoke the encroachment is 550 square feet and Yong Ah Noi 590 square feet. Both denied trespass and put plaintiff to strict proof.

There is a temporary house on Lot 1735. Plaintiff's father moved into the house in 1955 and lived there until he died in 1978. Some lots were originally used for fire rehabilitation scheme. Fire victims originally moved into this area under such scheme. Plaintiff has never stayed on Lot 1735 but used to visit it every month. Hence he knew of the extensions. There was a zinc fencing separating the lots. The zinc fencing is still standing there. Since his father's death he has rented out the house. He wanted to build a concrete house on the land but was prevented from doing so because of the encroachments.

In 1979 plaintiff instructed a licensed surveyor Cheong Fook Hoe (PW2) to carry out survey. As a result of the survey he learned of the extent of the encroachments. On 30 November 1979 he wrote to the Majlis Daerah Gombak asking whether any approval was given for the building of the extensions to both houses on Lots 1738 and 1739. The reply was in the negative. So, on 30 December 1979 he wrote to both defendants in similar terms notifying them of the encroachments and asking them to remove the encroachments.

The area of encroachment calculated by PW2 was accepted by defendants in documents marked "D" and "E". At p. 75 of the Appeal Record in Federal Court Civil Appeal No. 223 of 1983 shows the extent of encroachments in these words:

1. The concrete house on Lot 1739 has encroached about 6 to 6 1/2 feet into Lot 1735. The area of the building encroaching is about 200 sq. ft.

   The fencing has encroached about 11 feet and the area taken out of Lot 1735 is about 555 sq. ft.

2. The concrete building on Lot 1738 has encroached about 8 1/2 to 9 1/2 feet into Lot 1735. The area of the building encroaching is about 223 sq. ft. The toilet and bathroom which is about 55 sq. ft. has entirely encroached into Lot 1735.

   The fencing has encroached about 11 feet at the southern end and 14 feet at the northern end, and the area taken out of Lot 1735 is about 596 sq. ft.

   As a result of this encroachment, the width of Lot 1735 is now about 48 feet at the road frontage and about 38.5 feet at the back end.

After receiving letters from the plaintiff the defendants engaged Chong Toong Choong (DW2), a surveyor in March 1981 to carry out a survey. It turned out that prior to setting up his own practice he was the Chief Surveyor who was responsible for the plan C-1. He checked

the boundaries. He found the houses in Lots 1735, 1738 and 1736 were off centre of the road reserve by about 24 feet and not following the boundaries as given in C1. The common boundaries were not in compliance with boundaries laid out in C1, and their back boundaries also did not follow the plan and the depth of their lots was also short of the dimensions given in C1. He said these were due to wrong siting of the road.

When the defendants questioned the surveyor as to what ought to be done, Mr. Pradhan objected to the question as the defence was a denial of trespass. The defendants said the purpose of the question was to enable defendants to invite the Court to invoke certain powers under the provisions of s. 417 of the National Land Code. Mr. Pradhan pointed out that that section did not empower the Court to make an order for resiting of the road as envisaged by defendants. What the defendants wanted was for the Court to order a resurvey.

The learned Judge allowed the question. The surveyor explained that all the lands in the area in C1 are held by qualified titles. A survey has been done and marks put in for the issuance of final titles. He found Lots 1736 to 1739 and Lots 1740 to 1742 to be displaced. Since these lots have been displaced and the road wrongly sited he recommended a resurvey for the purpose of making a more correct plan to issue final titles. As plan C1 has not been used for issue of final title the survey department can be asked to resurvey by following the occupancy lines. In answer to cross-examination DW2 conceded that C1 is the final survey.

From the evidence of the Assistant Collector of Land Revenue, Encik Ali Badaruddin bin Abdul Kadir (DW3) there would seem to be lack of co-ordination between his department and the survey department. He said normally his office would ask the survey department for a final survey. He thought no requisition for final survey had been made in respect of the area shown by C1. That he said was in accordance with his records. But then his office was in charge of this area only in 1975. How was the area surveyed if no requisition was made? DW2 was clear that C1 was a final survey. In cross-examination DW3 admitted that s. 83 could only be exercised before a final survey. So how could it be invoked if there was a final survey as clearly stated by DW2. Yet, DW2 in cross-examination recommended resurvey under s. 83 (3) of the National Land Code. On this the learned Judge commented:

> The basis of his recommendation he has said, is s. 83(3) but it is obvious that this is not a case of the area enclosed by the boundaries being substantially different from those provisionally approved for alienation as envisaged by that provision. This is actually a case of the defendants' lots being wrongly demarcated by virtue of the mis-siting of the public road and of being therefore wrongly emplaced in breach of the specifications contained in their respective qualified titles. Further, it is also clear from a reading of the provisions of s. 83 that the procedure laid out therein can only be invoked if the survey plan has not been approved but in this case C1 clearly shows that it has been approved.

All lands in that area were held under qualified titles. Areas were calculated and lots assigned. A final survey has been carried out as shown by C1. From the evidence the plaintiff has in our view, as in the view of the learned Judge, established on the balance of probabilities that the lands upon which the defendants had trespassed were his. The wrong siting of the road which caused certain lots to have more land and others to have less is a matter between the authority and the respective landowners. Much stress was made of the fact that both defendants' lots have been made very much less in area as compared with their qualified titles even taking into account the encroachments. They have therefore suffered more than the plaintiff. It does not give any owner of a qualified title the right to encroach on the land of another owner of a qualified title to make up for his lost land by unlawful extension of his building thus encroaching on another's land. He does so at his peril. It is true the Court has

very wide jurisdiction where individual landownerships call out for remedies. Two wrongs do not make one right. On the other hand, the Court must also protect other owners of land who had done no wrong and whose land for no reason were encroached upon. On this the learned Judge has this to say at p. 47 of the Appeal Record:

> I must say that I do not think it is right or equitable that the malfeasance of the authorities concerned in mis-siting the road which deprived the defendants of their rightful land areas in terms of their size and location should be visited upon the plaintiff through no fault of his. The defendants' remedy should have been sought against the authorities concerned and should not prejudice the rights of an innocent third party like the plaintiff.
>
> I have considered the powers of the Court under s. 417 and I do not think, having regard to the purpose and scheme of the code, that I am empowered to make an order in terms of the request made on behalf of the defendants that the Court direct that a resurvey of the whole area be conducted in order to rectify the errors committed by the relevant authorities in constructing the road. Much as I sympathise with the defendants I am satisfied that the plaintiff is entitled to the relief's he has sought against them both ... .

On the evidence we agree with what the learned Judge has said.

In his submission in the Court below, Mr. Pradhan correctly pointed out this difficulty was created by the Land Settlement Officer. Plaintiff was innocent of the activities of the said officer. All the plaintiff sought is to use his land to which he has title. If the defendants have to suffer because of the action of some third party then these remedies are against the third party. They cannot deprive the plaintiff of the use and occupation of his land. The fact that he is not living on the land is immaterial.

The term "final survey" is a mere description. The National Land Code refers to survey and not to final survey (s. 176).

The word "survey" is defined by s. 396. From the evidence it is clear that the provisions of s. 396 have been complied with. DW2 was responsible for C1 and had approved it. He conceded it was a final survey. Here we have a survey within the meaning of the National Land Code and the effect of the survey is that the boundaries shown by the survey are conclusive. The difficulties created by the wrong siting of the road is another matter. It has nothing to do with the rights of the plaintiff under his qualified title. Under s. 176 (2) qualified title should confer on the proprietor the "like rights" that is to say the protection under s. 340 the centre piece of the National Land Code. Section 92 states clearly that alienation of State land is indefeasible.

On the matter of the fence it was said that there was no evidence to show that the fence was shifted since 1977 and therefore the defendants should be allowed to stay. The fence has been proved to be erected on plaintiff's land. This is really an admission that defendants had been occupying plaintiff's land and that they are entitled to adverse possession. An adverse possession is no defence under s. 341. A true owner can never be dispossessed of his land. The plaintiff alleges encroachment but the defence is a complete denial. The only issue before the Court is therefore the question whether there has been any encroachment or not. The question depends on the evidence that is before the Court. In this case it is based on the relative strength of their titles: see *Ocean Estates Ltd. v. Norman Pinder* [1969] 2 AC 19. The parties all have qualified titles. Their titles are of equal strength. Unless the defendant can show that on the basis of his title he has built within the areas given by his title he would be guilty of trespass. Once the plaintiffs has established his title and encroachment by the defendants the latter must show that they have better titles than the

plaintiff in respect of the areas they were alleged to have encroached. Persons with qualified titles are entitled to protection just as any other title holders. Adverse possession by a person for however long a period does not extinguish the title of the registered proprietor nor does it any way further his right to possession. Merely erecting permanent structure by extension of building unlawfully on the land is not sufficient to create any right against the rightful owner protected by title.

As to damages plaintiff conceded that no special damages have been pleaded. Once plaintiff knew of the encroachment he wrote to the defendants to cease the trespass. He asked them verbally previously to remove the encroachment but they refused to do so. They took the risk when they extended their buildings illegally by encroaching on plaintiff's land. If they had sought approval for extension they would have to refer to the building plan in which case they would be made aware of the location of the boundaries.

The learned Judge assessed damages from 1 February 1980 up to date of judgment at 5 cents per square foot per month in respect of 1st defendant 550 square feet and of 2nd defendant 590 square feet with costs against the defendants to be taxed. When the amount is calculated it is not high. It is not unreasonable or unfair.

For reasons given we dismiss the appeal with costs.

Also found at [1984] 2 CLJ 282